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Chapter 7 Trustee for Brobeck, Phleger & Harrison LLP

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re) Chapter 7
)
BROBECK, PHLEGER & HARRISON, LLP,) Case No. 03-32715-DM7)
)
Debtor.)

**DECLARATION OF RONALD F.
GREENSPAN IN SUPPORT OF MOTION
FOR ORDER (A) AUTHORIZING THE
ABANDONMENT OF BROBECK'S
DIGITAL RECORDS; (B) AUTHORIZING
THE TRUSTEE TO TRANSMIT NOTICE
OF ABANDONMENT TO FORMER
CLIENTS OF BROBECK;
(C) AUTHORIZING THE TRUSTEE TO
ENTER INTO AN ELECTRONIC DATA
ACCESS AGREEMENT WITH
GALLIVAN, GALLIVAN & O'MELIA,
LLC; AND (D) GRANTING RELATED
RELIEF**

Hearing Date

Date: July 18, 2006
Time: 1:30 p.m.
Dept: Courtroom 22
235 Pine Street, 22nd Floor
San Francisco, CA 94104
Judge: Hon. Dennis Montali

1 I, RONALD F. GREENSPAN, hereby declare that:

2 1. I am the chapter 7 trustee (the “Trustee”) in the bankruptcy case of Brobeck,
3 Phleger & Harrison LLP (“Brobeck”).

4 2. I submit this declaration in support of the accompanying “Motion for Order (A)
5 Authorizing the Abandonment of Brobeck’s Digital Records; (B) Authorizing the Trustee to
6 Transmit Notice of Abandonment to Former Clients of Brobeck; (C) Authorizing the Trustee to
7 Enter into an Electronic Data Access Agreement with Gallivan, Gallivan & O’Melia, LLC; and (D)
8 Granting Related Relief” (the “Motion”).¹ Unless otherwise indicated below, I have personal
9 knowledge of the following facts and, if called and sworn as a witness, I would and could
10 competently testify thereto.

11 **I. RELIEF REQUESTED**

12 By this Motion, I am seeking entry of an order, substantially in the form of the proposed
13 order attached as Exhibit A to the Motion, authorizing me to (i) turn over the digital records stored
14 on Brobeck’s servers (the “Digital Records”) to an outside vendor, Gallivan, Gallivan & O’Melia
15 LLC (“GGO”), (ii) abandon any right, title and interest of the estate in and to the Digital Records
16 after such turnover and in accordance with the Methodology (as that term is defined in the Motion),
17 (iii) enter into an electronic data access agreement with GGO (the “Access Agreement”), and (iv)
18 transmit notice of abandonment of the Digital Records to a service list comprised of former clients
19 of Brobeck.

20 **II. INTRODUCTION**

21 1. Through this Motion, I am seeking permission to alleviate a significant
22 administrative burden on the estate and, at the same time, provide a beneficial public service in
23 connection with a national level historical preservation project of the University of Maryland and the
24 Library of Congress (the “Library”). Since my appointment, I have maintained Brobeck’s computer
25 servers and the accompanying Digital Records for use in administering the bankruptcy estate. One
26 _____

27 ¹ All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the
28 Motion.

1 key use of the Digital Records has been in connection with my efforts to collect receivables from
2 former Brobeck clients. These collection efforts have wound-down substantially, and I no longer
3 need immediate access to the Digital Records.

4 2. I have investigated alternatives to maintaining Brobeck’s servers at the expense of the
5 estate. Currently, those costs range from \$2,500 - \$5,000 per month. The estate has also incurred
6 additional costs for service and repair to the servers and I believe that the estate is likely to face
7 substantial additional expenses in the future.

8 3. For the past several months, I have engaged in discussions with Dr. David Kirsch,
9 GGO, and counsel for the University of Maryland, regarding the treatment of the Digital Records.
10 Dr. Kirsch introduced the Library’s national historical project and his proposal to include the Digital
11 Records as part of his research in connection with these discussions. I raised several concerns upon
12 learning of the proposal, including whether I would continue to have access to the Digital Records at
13 a reasonable cost, and whether the confidentiality of the Digital Records would be protected. Dr.
14 Kirsch and GGO were able to address my concerns.

15 4. At the conclusion of the discussions, I reached an agreement that would allow me to
16 save the day to day costs related to the servers, preserve my ability to review the Digital Records in
17 the future, and at the same time addressing my concerns regarding confidentiality of the former
18 client files. Through the plan, I would turn over the Digital Records to GGO, at which time they
19 will be deemed abandoned by the estate. GGO and the University of Maryland would then
20 undertake the necessary work and cost of ensuring the integrity of the data and storing the
21 information on new servers, all while protecting the confidential nature of the files in connection
22 with a methodology that is described in more detail below. If, in the future, I need to access Digital
23 Records, I will still be able to do so at a reasonable expense under the terms of the Access
24 Agreement.

25 5. I submit that there is good cause to support the Motion, as it will relieve the estate of
26 the burden of maintaining the servers, preserve the Digital Records, and also serve a beneficial
27 public purpose.

28

1 **III. BACKGROUND**

2 **A. General Background**

3 6. Brobeck was organized as a general partnership under the California Uniform
4 Partnership Act by adoption of a General Partnership Agreement dated as of September 1, 1989, of
5 Brobeck, Phleger & Harrison. Brobeck filed a registration as a limited liability partnership on or
6 before September 30, 1997, pursuant to Section 16953 of the Revised Uniform Partnership Act, Cal.
7 Corp. Code § 16100 et seq. (“RUPA”).

8 7. Brobeck’s dissolution was formalized effective February 10, 2003, under Section
9 16801 of RUPA, pursuant to a certain Amended and Restated Partnership Agreement dated as of
10 February 10, 2003. Under this final amendment to the Brobeck partnership agreement, a
11 Liquidation Committee (the “Liquidation Committee”) was formed to carry out Brobeck’s
12 dissolution. Only days later, on February 14, 2003, Brobeck laid off substantially all of the Former
13 Employees.

14 8. On March 25, 2003, the Liquidation Committee entered into an agreement (the
15 “Agreement”) with Larson Gallivan & Gallivan LLC, the predecessor to GGO, to make and
16 preserve a digital backup of Brobeck’s computer network. The Agreement also provided the terms
17 by which Brobeck would be able to recover any electronic files from this storage database in the
18 future. Specifically, the Agreement was meant to provide future Brobeck clients and former
19 Brobeck partners with access to client files at no expense to Brobeck.

20 9. On September 17, 2003, certain of Brobeck’s creditors filed in this Court an
21 involuntary bankruptcy petition against Brobeck under chapter 7 of the title 11 of the United States
22 Code (the “Bankruptcy Code”). On October 10, 2003, this Court entered an order for relief with
23 respect to that petition. On October 14, 2003, E. Lynn Schoenmann was appointed interim trustee.

24 10. I was elected as chapter 7 trustee for Brobeck on November 21, 2003, and was
25 certified and qualified by the Office of the United States Trustee on December 12, 2003.

26 11. On August 24, 2004, the Court entered an Order Authorizing Assumption of
27 Executory Contracts [Docket No. 471], including the Agreement.

28

1 12. On February 15, 2005, I filed a “Motion for Order (A) Authorizing the Abandonment
2 of Files And Other Materials of Former Brobeck Clients; (B) Authorizing the Trustee to Transmit
3 Notice of Abandonment to Former Clients; and (C) Granting Related Relief” (the “Client File
4 Abandonment Motion”), through which I sought to abandon the paper copies of the files of former
5 Brobeck Clients. The Client File Abandonment Motion outlined the steps taken to notify former
6 Brobeck clients regarding the potential destruction of their files. The Client File Abandonment
7 Motion, which only impacted the files of former Brobeck clients, not Brobeck’s Administrative
8 Files, also provided the former Brobeck clients with contact information for the storage companies
9 at which the files were stored, so that the former Brobeck clients could work directly with the
10 storage companies to retrieve their files.

11 13. On March 21, 2005 this Court held a contested hearing regarding the Client File
12 Abandonment Motion (the “March Hearing”). At the March Hearing, Dr. David Kirsch, a professor
13 from the University of Maryland, presented his statement regarding the Library and his objectives to
14 preserve certain Brobeck digital records after abandonment. Although I was not yet ready to move
15 to abandon Brobeck’s digital records, Dr. Kirsch did introduce the Library and his objective to
16 prevent permanent destruction of all of Brobeck’s digital records and introduced the objective to
17 preserve the Brobeck digital records in a closed archive (“Closed Archive”).

18 14. On September 14, 2005, I moved to abandon the paper copies of the former law
19 firm’s partnership records, by filing the “Motion for Order Authorizing the Trustee to Abandon
20 Administrative Files and Related Materials of Brobeck, Phleger & Harrison LLP” (the
21 “Administrative Files Motion”) [Docket No. 1528]. Through the Administrative Files Motion, I
22 sought to abandon the Brobeck estate’s interest in Brobeck’s remaining paper records. On October
23 25, 2005, the Court entered an Order approving the Administrative Files Motion.

24 15. Throughout the administration of the case, I have accessed Brobeck’s records directly
25 from the digital records on Brobeck’s original servers. I have maintained the servers at the expense
26 of the estate at a cost that ranges from \$2,500 - \$5,000 per month. The estate has had to incur
27 additional amounts for service and repair due to the age of Brobeck’s servers. The time and expense
28 associated with the servers has increased in recent months and are likely to be substantial in the

1 future. The servers have had substantial downtime, and much of the software that resides on the
2 servers is no longer supported. In the past, I have had to hire outside vendors to retrieve data and to
3 attempt to make use of the dated software

4 16. Recently, during a routine inspection of Brobeck’s Offices at One Market Plaza,
5 Spear Street Tower, San Francisco, CA 94105, an inspector from the San Francisco Fire Department
6 reviewed Brobeck’s office space, and informed a representative of FTI Consulting, Inc (“FTI”), my
7 financial advisor, that the location of Brobeck’s servers appeared to be in violation of several fire
8 codes. Among other things, the inspector noted that the servers were not stored in a location that
9 complied with the Fire Department’s regulations. Converting the existing storage facility to meet
10 the inspector’s specifications would require, among other things, installation of a sprinkler system,
11 an exhaust, and emergency power shutoff switches. I believe that these conversions would involve
12 significant expense to the estate.

13 17. On several occasions, I have had discussions with Dr. Kirsch regarding the
14 possibility of providing me with access to the Digital Records through the Library’s depository.
15 Further discussions ensued regarding a cooperative solution to meet Dr. Kirsch and the Library’s
16 preservation objective, my potential need to access the Digital Records in the future, and the need to
17 preserve the confidentiality of the files of former Brobeck clients.

18 **B. Digital Records Preservation by the Library of Congress, NDIIPP and the University of**
19 **Maryland.**

20 18. I am informed that Dr. Kirsch has led the effort to acquire and preserve the digital
21 records of dot-com era (“Dot-Com”) companies with the support of the Library. Dr. Kirsch has also
22 informed me that when he learned of Brobeck’s intention to liquidate, his research interests led him
23 to inquire about the Digital Records. A sizeable portion of the Digital Records is comprised of files
24 of former Brobeck clients’ files (“Electronic Client Files”), including those of failed Dot-Com
25 companies. Dr. Kirsch also informed me that he became concerned about the digital integrity of
26 Brobeck’s own internal partnership records (“Partnership Records”), given Brobeck’s recognized
27 stature in the California legal community.
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1 19. I am informed and believe that the Library and NDIIPP support Dr. Kirsch’s plan to
2 collect and preserve the Digital Records, as they present a particularly stark example of content that
3 will disappear unless special efforts are made to preserve them.

4 20. Dr. Kirsch has advised me that he is aware of the potential problems presented by the
5 confidential relationship under which the Client Files were created, and that he has convened an
6 Advisory Council of esteemed legal scholars and practitioners to advise him and the Library in the
7 development of a Methodology for preserving and archiving the at-risk Brobeck Digital Records
8 while protecting the interests of former clients (“Methodology”). The members of the Advisory
9 Council are listed in Appendix A of the Methodology, which is attached as Exhibit A to the Kirsch
10 Declaration.

11 **C. A Cooperative Solution.**

12 21. On May 10, 2006 (the “May 10 Meeting”), I, my counsel, Dr. Kirsch and his research
13 assistant, the advising bankruptcy attorney for the University of Maryland, William Gallivan of
14 GGO, and Brandon Beal of FTI Consulting met to consider the practical aspects of transferring the
15 Digital Records stored on Brobeck’s servers to GGO, to discuss the means and cost of providing
16 continued access to Brobeck’s records for me, to review the procedures for setting up and
17 maintaining a closed archive, and to plan a cooperative effort to move for turnover of the digital
18 records to GGO and for abandonment of the records by Brobeck after turnover. The May 10
19 Meeting proved successful on all issues.

20 22. The parties agreed that at this point in the administration of the bankruptcy estate,
21 transferring the Digital Records to GGO, a NDIIPP partner, could serve both my need to abandon
22 burdensome property and to have continued access to the records to administer the bankruptcy case.
23 The transfer would also serve as the initial step in establishing a NDIIPP archive of the Brobeck
24 records. I am currently negotiating an agreement with GGO pursuant to which GGO would collect
25 data from the original Brobeck servers, and then, on an ongoing basis upon requests from Brobeck,
26 GGO will retrieve and deliver Digital Records to me for the continued administration of the Brobeck
27 estate. All fees related to the collection of the digital records, estimated by GGO at \$31,000, will be
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1 paid by the University of Maryland and GGO. I would pay GGO only for requests for documents
2 on an hourly basis, which the GGO estimates will cost approximately \$500 per retrieval. GGO will
3 work with NDIIPP partners to prepare the data for the archive, allowing me to benefit from the
4 Library's advancements in data preservation technology. After the bankruptcy case's closure,
5 NDIIPP will be prepared to physically transfer the data to its own closed archive depository.

6 23. At the May 10 Meeting, the parties reviewed and commented on the Methodology for
7 a closed archive and commented on it. Dr. Kirsch revised the Methodology to address some of the
8 issues discussed at the May 10 Meeting.

9 24. I am informed and believe that the Methodology will systematically protect
10 confidential Electronic Client Files by establishing safeguards to prevent improper access to any
11 sensitive documents, and as acknowledged in the Methodology, these restrictions may keep part of
12 Brobeck's Digital Records sealed for many years. The Methodology consists of three (3) phases:
13 the first phase describes the preliminary steps the Library will take in advance of the closed
14 archive's creation; the second phase describes the closed archive's ordinary and ongoing operations;
15 and the third phase describes how statistical information from the closed archive will be made
16 available for academic research.

17 25. In light of the technical problems I have experienced with the Brobeck servers and
18 my need to have continued access to Brobeck records until the closing of the case, I have determined
19 that the Library, the NDIIPP, and the University of Maryland have presented a beneficial alternative
20 to maintaining the original servers by transferring the Digital Records to GGO and allowing me to
21 access to the Brobeck records at an hourly charge for retrieval of requested files. Also, the transfer
22 of the Digital Records will permit me to permanently shut down the original servers, thereby
23 avoiding the costs associated maintenance and repair, as well as with compliance with the
24 requirements of the San Francisco Fire Department. Furthermore, I am informed and believe that
25 the Methodology proposes a closed archive which adequately protects former clients' attorney-client
26 privilege and complies with the Archivists' Code of Ethics.

1 **IV. BASIS FOR REQUESTED RELIEF**

2 **A. The Abandonment Of The Digital Records.**

3 26. I believe that abandonment of the Digital Records is reasonable and appropriate
4 under the circumstances. The burdensome nature of whatever interest the estate may or may not
5 have in the Digital Records requires that I take affirmative steps to ensure that the estate no longer
6 has obligations with respect to the continued storage and/or preservation of the subject files. The
7 Digital Records are both burdensome to the estate and are of inconsequential value and benefit to the
8 estate.

9 27. With respect to the Digital Records stored by Brobeck, the best evidence that the
10 Digital Records are both burdensome and of inconsequential value and benefit, is that I will incur
11 material costs to maintain and repair the servers, without an accompanying benefit to the estate.
12 Moreover, I will need to spend material amounts to comply with the requirements of the San
13 Francisco Fire Department. These costs would need to be incurred even though one of the key
14 purposes in having the current level of daily access (*i.e.* collecting receivables) has been served.

15 28. Moreover, Brobeck's servers have no value, or have only inconsequential value, to
16 the bankruptcy estate. The estate is not engaged in the practice of law, and I do not believe there is a
17 need to keep the servers as a business matter. The storage of Brobeck's servers and the related
18 compliance costs will outweigh any potential benefit to the estate if the estate is forced to maintain
19 the Digital Records. In fact, any potential benefit of continuing to maintain the Digital Records is
20 likely to dwindle over time.

21 **B. The Methodology.**

22 29. I am informed and believe that the Closed Archive would serve as a secure
23 depository only for certain of the Electronic Client Files and Partnership Records, and the
24 Methodology prepared by Dr. Kirsch and the Advisory Council to govern the access to the Digital
25 Records would adhere to the restrictions of the attorney-client privilege and duty of confidentiality
26 in addition to the confidentiality principles of the American Archivists' Code of Ethics.
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1 30. As noted above, the Methodology consists of three (3) phases: the first phase
2 describes the preliminary steps the Library will take in advance of the Closed Archive’s creation; the
3 second phase describes the Closed Archive’s ordinary and ongoing operations; and the third phase
4 describes how statistical information from the Closed Archive will be made available for academic
5 research. I am informed and believe that, at each phase, the Methodology’s procedures restrict
6 access to information covered by the duty of confidentiality and the attorney-client privilege.

7 31. During Phase One, the Library will notify former clients that it intends to transfer
8 their files into a closed archive. Former Brobeck clients will have three choices: (1) they may
9 decline inclusion in the Closed Archive by returning the opt-out form; (2) they may do nothing and
10 thus consent to inclusion in the Closed Archive; or (3) they may consent to inclusion in the
11 traditional archive by waiving their attorney-client confidentiality and thus making their records
12 immediately available to research. Even clients who fail to object prior to the transfer will have the
13 opportunity to raise their objections and have their files removed at any time in the future.

14 32. The Closed Archive constructed in Phase One will limit access to materials protected
15 by attorney-client confidentiality and privilege. This protection will remain in place until the Closed
16 Archive receives permission from a former client, or until it determines that confidentiality or
17 privilege no longer (or never did) apply to a particular file. Former Brobeck clients whose
18 documents could potentially be included in the Closed Archive will be notified via the Estate’s
19 client mailing list.

20 33. I am informed and believe that several classes of documents will be excluded from
21 preservation by the Closed Archive before its construction. The Library will reject any files relating
22 to the representation of personal clients (as opposed to corporate or institutional clients), as well as
23 any files documenting Brobeck employment or partnership relationships. The files of former
24 Brobeck clients who object to inclusion in the Closed Archive will also be removed, along with the
25 files of any former clients who have approached the estate or GGO in the past to retrieve their
26 records. This exclusion process bypasses any confidentiality issues related to these records, and
27 ensures that they are destroyed in a fashion which eliminates the possibility of future access.

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1 Because the remaining protected files will be preserved strictly within the Closed Archive, I believe
2 this arrangement precludes any breach of the duty of attorney-client confidentiality or privilege.

3 34. Phase Two of the Methodology describes the Closed Archive’s ordinary operation. I
4 am informed and believe that this phase presents two safeguards protect documents. First, only
5 internal archivists working on preservation-related tasks will handle the confidential files, and they
6 will sign non-disclosure agreements strictly limiting their activities. Second, nothing will be
7 transferred outside the Closed Archive without either (a) the receipt of the former clients’ written
8 waiver of attorney-client confidentiality and privilege, or (b) a relevant change in the applicable law
9 governing confidentiality deemed sufficient by an advisory committee of legal ethicists.

10 35. Finally, Phase Three provides for aggregate statistical research. I am informed and
11 believe that several safeguards are in place to protect attorney-client confidentiality and privilege
12 during this phase. I am informed and believe that this phase is modeled on other existing uses of
13 sensitive data, such as the Research Data Center Program operated by the U.S. Census to allow
14 scholars access to confidential, personal census data. This phase offers similar safeguards, such as a
15 thorough evaluation of a research project’s academic merit, with the strict exclusion of commercial
16 projects. Any scholars passing this review will sign non-disclosure agreements and conduct their
17 work strictly within the Closed Archive, just as the archivists in Phase Two. The Closed Archive
18 will then monitor both the scholars’ activity and their work-product, the latter of which must be
19 approved by a review committee before release. Because these procedures adequately prevent the
20 release of any protected information, Phase Three, like Phase One and Two, does not violate the
21 attorney-client privilege or the duty of confidentiality, and the Closed Archive protects the rights of
22 former clients.

23 36. I am informed and believe that the Methodology also solves the confidentiality issues
24 in a way that is consistent with the Archivists’ Code of Ethics. The concept of a closed archive is
25 consistent with Article VI of the Archivists’ Code of Ethics, which states that “[a]rchivists may
26 place restrictions on access for the protection of privacy or confidentiality of information in the
27 records.” Phase Three’s aggregate research complies with the requirement to “protect the privacy
28 rights of donors and individuals or groups who are the subject of records,” as described in Article

1 VII of the Archivists’ Code of Ethics. I am informed and believe that the Methodology clearly
2 separates the management of documents restricted by legal principles from the management of
3 regular archiving issues.

4 **C. The Notice of Abandonment.**

5 37. Brobeck’s former clients have had ample opportunity to receive their files in
6 connection with the pre-bankruptcy winding up as well as during the administration of the case.
7 Former Clients as well as Former Brobeck Partners have had ready access to the Digital records via
8 the Gallivan contracts. Accordingly, I do not have a strong concern that possible destruction of the
9 Digital Records would prejudice any former clients of Brobeck. To be certain, however, I have
10 proposed that the Court authorize the transmission of the notice of abandonment, via United States
11 mail, postage prepaid, to those former Brobeck clients that were sent notice in connection with the
12 Client File Abandonment Motion, as well as by publication in one national newspaper and one San
13 Francisco publication. The notice of abandonment will include an option sheet to allow former
14 Brobeck client to submit their choice to opt-out of the Closed Archive or opt-into the traditional
15 archive (the “Option Sheet”). Service of the notice of abandonment and the Option Sheet will be
16 made at the University of Maryland’s expense.

17 38. Among other things, the notice of abandonment will inform former Brobeck clients:

18 a. That they may prevent their records from being transferred to the
19 closed archive by opting-out of the process.

20 b. That if they take no action, then their records will be preserved in
21 the closed archive. Former Brobeck clients will, however, retain the right
22 to opt-out and collect their files at any time in the future.

23 c. That if they wish to make their records immediately available
24 outside the closed archive, the Abandonment Notice will also provide
25 former Brobeck clients the opportunity to waive the attorney-client
26 privilege and any ethical duty of confidentiality through a strictly opt-in
27 process.
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HENNIGAN, BENNETT & DORMAN LLP
LAWYERS
LOS ANGELES, CALIFORNIA

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I believe that transmission of the notice of abandonment is a reasonable means of locating former Brobeck clients and is appropriate under the circumstances. Further, providing a "final call" to the former clients would be a good practice so that all concerned can have notice of the treatment of the Digital Records.

D. The Access Agreement.

39. Through the Motion, I am also seeking authority to enter into the Access Agreement so that I may have continued access to the Digital Records. Under the terms of the Access Agreement, which the parties are in the process of negotiating, GGO will do the following:

(i) acquire the Digital Records, (ii) check for data integrity, (iii) index, search and filter the data in a form that facilitates review, production and issue coding by attorneys and paralegals. After GGO has acquired the Digital Records, GGO will charge fees for simple document retrieval and production will be billed at \$200/hour for requests related to the retrieval of documents. GGO has informed me that the average standard document request will take between two to three hours, for an average of \$500, and will be delivered on a DVD to my counsel via Federal Express. Non-standard document requests could take longer and GGO will provide an estimate for any request that exceeds \$500.

40. The Access Agreement will allow me to protect the digital integrity of the Digital Records, while at the same time ensuring future access to those files, and at a substantially reduced cost. For these reasons, I believe that approval of the Access Agreement will accomplish a sound business purpose.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on June 28, 2006 at Chicago, Illinois.


RONALD F. GREENSPAN